Chuah Ah Kee @ Chua Seang Hor & Ors v Kumpulan Perunding (1988) Sdn Bhd

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO T-02(IM)-12 OF 2010

B

LOW HOP BING, ABU SAMAH AND ALIZATUL KHAIR JJCA
8 AUGUST 2012

C

Companies and Corporations — Directors — Breach of undertaking — Whether established — Whether written undertaking given on company's letterhead valid and enforceable against directors — Undertaking only signed by one director

D

Companies and Corporations — Directors — Liabilities — Whether one director can give an undertaking binding upon other directors in the absence of their express consent

E

The appellants/defendants had given the respondent/plaintiff a written undertaking vide letter dated 21 February 1994 on the company's letterhead to pay the plaintiff's professional fees. The plaintiff's action was based on the said letter of undertaking which the plaintiff claimed imposed liability on the defendants, who were the directors of the company at the time the letter of undertaking was written, to pay to the plaintiff all outstanding professional fees incurred. The defendants claimed that the letter of undertaking was issued by the company and thus the plaintiff's cause of action was against the company and not against the defendants. The High Court allowed the plaintiff's claim. This appeal brought by the defendants revolved around the issue whether the letter of undertaking bound the defendants or whether it bound the company.

F

G

Held, allowing the appeal with costs:

H

(1) The learned judge fell into error in holding that the letter of undertaking was binding on the defendants. The letter of undertaking did not bind the defendants because: (a) the letter of undertaking was written on the letterhead of the company; (b) the letter of undertaking was signed by one director, ie the third defendant on behalf of the company; and (c) the letter of undertaking was not signed by all the directors (ie the defendants) in their capacity as such (see para 14).

I

(2) Unlike a partnership where liability is joint and several, a director cannot purport to bind the other directors in the absence of express consent by the other directors (see para 15).

[Bahasa Malaysia summary

Perayu-perayu/defendan-defendan telah memberikan kepada responden/plaintif akujanji bertulis melalui surat bertarikh 21 Februari 1994 atas kepala surat syarikat untuk membayar fee profesional plaintif. Tindakan plaintif adalah berdasarkan surat akujanji tersebut yang mana plaintif menuntut mengenakan liabiliti ke atas defendan-defendan, yang mana adalah pengarah-pengarah syarikat pada masa surat akujanji tersebut ditulis, untuk membayar plaintif kesemua bayaran tertunggak fee profesional yang perlu dijelaskan. Defendan-defendan mendakwa bahawa surat akujanji dikeluarkan oleh syarikat dan oleh itu kausa tindakan plaintif adalah terhadap syarikat dan bukan terhadap defendan-defendan. Mahkamah Tinggi membenarkan tuntutan plaintif. Rayuan ini dibangkitkan oleh defendan-defendan melibatkan isu sama ada surat akujanji mengikat defendan-defendan atau sama ada ia mengikat syarikat.

Diputuskan, membenarkan rayuan dengan kos:

(1) Hakim yang bijaksana tersilap dalam memutuskan bahawa surat akujanji mengikat defendan-defendan. Surat akujanji tidak boleh mengikat defendan-defendan kerana: (a) surat akujanji ditulis mengunakan kepala surat syarikat; (b) surat akujanji ditandatangani oleh satu pengarah, iaitu defendan ketiga bagi pihak syarikat; dan (c) surat akujanji tidak ditandatangani oleh kesemua pengarah-pengarah (iaitu defendan-defendan tersebut) dalam kapasaiti mereka sebagai pengarah (lihat perenggan 14).

(2) Tidak seperti perkongsian di mana liabiliti adalah bersama dan berasingan, pengarah tidak boleh mengikat pengarah-pengarah yang lain dalam ketiadaan izin nyata daripada pengarah-pengarah tersebut (lihat perenggan 15).]

Notes

For cases on liabilities, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 299–300.

Appeal from: Civil Suit No 22–80 of 2002 (High Court, Kuala Terengganu)

Rajindar Singh Veriah (Rheena Kaur with him) (Rajindar Singh Veriah & Co) for the appellants.
Moses Susayan (Prasad Abraham & Associates) for the respondent.

Alizatul Khair JCA:

[1] The appellants ('the defendants at the High Court') appealed against the decision of the High Court Kuala Terengganu which had allowed the claim of the respondent/plaintiff ('the plaintiff') after a full trial.

[2] The plaintiff's claim was for:

(a) the sum of RM80,000 as per the consent order dated 9 November 1993;

(b) interest at the rate of 8%pa on the sum of RM80,000 (from the date of the consent order to full realisation);

(c) the sum of RM244,814.86 as the sum awarded in the final award No 2 dated 20 November 2001;

(d) interest at the rate of 8%pa on the sum of RM244,814.86 from the date of the final award No 2 to full realisation; and

(e) costs.

[3] The background facts are briefly as follows.

[4] Taman Seaview Sdn Bhd (the company) had, sometime in 1988, engaged Akitek Indahreka (M) Sdn Bhd to tender their services in respect of a project known as 'Cadangan 2 Blok Pangsapuri 8 Tingkat Termasuk Tingkat Bawah untuk letak kereta dan 2 Blok Pangsapuri 4 Tingkat Termasuk Tingkat Bawah Untuk Tempat Letak kereta Di Atas Lot 1709, Mk Chendering, Daerah Kuala Terengganu' ('the project').

[5] In 1988, Akitek Indahreka (M) Sdn Bhd ceased practice as architects and the plaintiff took over the management and control of all works and projects under Akitek Indahreka (M) Sdn Bhd including the project.

[6] Akitek Indahreka (M) Sdn Bhd had, in 1985, sued the company for unpaid professional fees vide Kuala Terengganu High Court Suit No 104 of 1985. On 9 November 1993, both parties entered into a consent order whereby the company agreed to pay the plaintiff the sum of RM80,000 as full payment of the plaintiff's professional fees.

[7] A further sum of RM496,687.52 was claimed by the plaintiff against the company as professional fees pursuant to a memorandum of agreement drawn up in 1992 for services rendered in respect of the project. A dispute arose between the parties as to the plaintiff's claim of this sum and the dispute was referred to arbitration. On 20 November 2001, the arbitrator issued a final award No 2 awarding a sum of RM244,814.86 to the plaintiff.

[8] Sometime in February 1994, the company gave notice to the plaintiff of its intention to sell the said Lot 1709 and the project situated on the said lot to Gardenia Pearl Sdn Bhd. The plaintiff agreed to this and in consideration thereof the defendants gave a written undertaking vide letter dated 21 February 1994 ('letter of undertaking') on the company's letterhead to the plaintiff to

pay the plaintiff's professional fees incurred up to the date prior to the company signing the sale and purchase agreement with Gardenia Pearl Sdn Bhd.

[9] The plaintiff's action herein is based on the letter of undertaking which the plaintiff claimed imposes a liability on the defendants, who were the directors of the company at the time the letter of undertaking was written, to pay to the plaintiff all outstanding professional fees incurred up to the date of the sale and purchase agreement with Gardenia Pearl, as quantified in the consent order and the arbitrator's award.

[10] The appeal before us revolves around the letter of undertaking, whether it binds the defendants as alleged by the plaintiff or whether it binds the company as contended by the defendants.

[11] The defendants denied giving the letter of undertaking to the plaintiff to pay the outstanding professional fees. The defendants contended, inter alia, as follows:

(a) the letter of undertaking was issued by the company to the plaintiff whereby the company agreed to pay the plaintiff's outstanding professional fees; and

(b) the plaintiff's cause of action is against the company and not against the defendants.

[12] For ease of reference the letter of undertaking is reproduced below in full:

> Kumpulan Perunding (1988) Sdn Bhd
>
> 44, Tingkat 1, Jalan Sultan Ismail,
>
> 20200 Kuala Terengganu,
>
> Terengganu
>
> Dear Sir,
>
> Re: Condominium Project On Land Held Under Title No:
>
> HS(D) 4432 PT 2136 P Mukim Chendering. Daerah Kuala Terengganu
>
> Kindly be informed that we have decided to sell the above property with approved building plans to Gardenia Pearl Sdn Bhd with the arrangement that all professional fees incurred up-to-date prior to the signing of the sale and purchase Agreement between Taman Seaview Sdn Bhd and Gardenia Pearl Sdn Bhd shall be borne absolutely by the directors of Taman Seaview Sdn Bhd and there shall be no claim whatsoever against Gardenia Pearl Sdn Bhd.

Fees thereafter shall be borne by Gardenia Pearl Sdn Bhd.

If you consent with the above arrangement, kindly signify your acceptance below.

Thank you.

Your faithfully

……sgd……	……sgd……
Yap Fock On	For Kumpulan Perunding
For Taman Seaview.	(1988) Sdn Bhd

[13] The learned High Court judge found that the letter of undertaking was binding on the defendants and they were therefore liable to pay to the plaintiff all the outstanding professional fees as set out in the plaintiff's statement of claim. The learned judge in his judgment said:

> Adalah teramat jelas bahawa berdasarkan surat akujanji tersebut bahawa segala bayaran yuran profesional plaintif hendaklah sepenuhnya dibayar oleh defendan-defendan sendiri dan bukan oleh TSSB. Saya mendapati bahawa plaintif telah membuktikan bahawa pada setiap masa material defendan-defendan adalah pengarah-pengarah TSSB.

[14] In our view the learned judge fell into error in holding that the letter of undertaking was binding on the defendants. We agree with the defendant's submission that the letter of undertaking did not bind the defendants for the reasons which we set out below:

(a) the letter of undertaking was written on the letterhead of the company;

(b) the letter of undertaking was signed by one director, ie the third defendant, Yap Fock On, on behalf of the company; and

(c) the letter of undertaking was not signed by all the directors (ie the defendants) in their capacity as such.

[15] Thus, in our view, even though the letter (of undertaking) states that 'all professional fees incurred up-to-date prior to the signing of the sale and purchase agreement between Taman Seaview Sdn Bhd and Gardenia Pearl Sdn Bhd shall be borne absolutely by the directors of Taman Seaview Sdn. Bhd …', in the absence of any evidence to show that the defendants have agreed in their capacity as directors to provide such undertaking, the letter of undertaking cannot legally bind the defendants. Unlike a partnership where liability is joint and several, a director cannot purport to bind the other directors in the absence of express consent by the other directors.

[16] For the above reasons, we unanimously allow the appeal, set aside the

order of the High Court and substitute it with an order that the plaintiff's claim be dismissed with costs of RM35,000 to the defendants here and below. We also ordered the deposit be refunded to the defendants.

Appeal allowed with costs.

Reported by Kanesh Sundrum